HOW A CONDITIONAL LIMITATION OPERATES.

I.

WHENEVER a freehold is limited to take effect upon a contingency which may happen before the regular expiration of the preceding estate of freehold, it takes effect in defeasance of such interest. The executory limitation thus operating cuts off the prior interest abruptly. By the "intrinsic force" of the executory limitation the preceding estate is terminated. The gift over operates to destroy, to divest,[1] in defeasance of the prior gift. In the words of LORD LANGDALE, Master of the Rolls, in *Jackson* v. *Noble*[2] the preceding estate is "defeated by a contingent executory gift over."

There is hardly any rule of the law of real property more fundamental than the rule that at common law no future estate can take effect in defeasance of a preceding estate. Any future estate limited to take effect before the natural termination of the preceding estate, whether that estate be a particular estate or a remainder,[3] is necessarily in defeasance of that estate[4] and therefore utterly void. It is of the utmost importance to emphasize this conception of the effect of a future estate to arise before the regular termination of the preceding estate. "The true point of distinction" between remainders and such limitations over as are not remainders, says Fearne, is that "the former are limited to commence when the first estate is, by the very nature and extent of its original limitation, to expire or determine; whereas the latter are limited so as to be independent of the measure or extent given to the first estate, and to take effect in possession, upon an event which may happen before the regular determination, to which the first estate is liable from the nature of its original limitation, and so as to rescind it."[5]

---

[1] Harrison v. Foreman, 5 Ves. Jun. 207; Robinson v. Wood, 27 L. J. Ch. 726.

[2] 2 Keen, 590.

[3] Cogan v. Cogan, Cro. Eliz. 360; Fearne, Cont. Rem. 263.

[4] A reversion does not take effect in defeasance of a particular estate. "A reversion is where the residue of the estate always doth continue in him, that made the particular estate, or where the particular estate is derived out of his estate." Co. Lit. 22 *b*. The only future interests that could be created by acts of parties at common law were remainders. A remainder "is a residue of an estate in land depending upon a particular estate, and created together with the same." Co. Lit. 49 a, 143 a. It *depends* upon the particular estate for support, consequently if the particular estate were cut short, defeated, it too must fall. Statutory changes which have in some jurisdictions enabled grantees and assignees of reversions to take advantage of conditions have not altered the common law so far as persons entitled in remainder are concerned. Challis, Real Prop. 3rd Ed. 81.

[5] Fearne, Cont. Rem. 14; and see the definition of an executory devise in Jarman, Wills, 6th Eng. Ed. 1432.

The common law judges might have taken the position that every future limitation operates upon the preceding freehold, when less than a fee, as the contingency named in a limitation, serving to render it a determinable estate. But this they did not do.[6] They held that a future limitation, if not limited to spring up after the termination of the particular estate, operated in defeasance of that estate,[7] unless such estate, being less than a fee, was subject to regular termination only, whether upon one or more than one event, and the contingency upon which the future interest was to vest in possession could be construed as a limitation of the particular estate and not as a condition subsequent.[8] If the first estate was a fee, no future estate could be limited on it, even though the contingency were one upon which such an estate of inheritance—had there been no gift over—might have been made to determine.[9]

The common law stood so, and stands so today. The great change by which it became possible to limit a future estate in defeasance of a preceding estate was not brought about by any judicial undermining or repudiation. The common law principles were too fundamental and too well established for that.[10] The change was made by statutes, and it is only by virtue of statutes acting directly or indirectly upon these principles that such limitations are today cognizable in courts of law. The new condition was achieved by what Blackstone calls "a sort of parliamentary magic."

Perhaps no writer has expounded the operation of the executory limitation upon the preceding estate more forcefully than Williams.[11] The moment the contingency happens upon which the executory limitation becomes operative, "without any further thought or care

[6] See the illustrations in Fearne, Cont. Rem. 261, 262.

[7] Digby, History of the Law of Real Property, 5th Ed., 264.

[8] A particular estate which may determine upon the happening of a future event by virtue of a collateral limitation "is normally determined by the happening of that event; and a remainder may be as well limited over upon such a determinable estate, as upon the like estate when not determinable." Challis, Real Prop. 3rd Ed. 82. "So that if A was tenant for life, remainder to B in fee, on condition that A being a feme sole continues a widow; if A marries, the heir enters, and defeats the estate of A and of B also; but if an estate had been granted to A *durante viduitate* remainder to B and after A had married, the estate of A had determined by the limitation, and the remainder to B should be granted." Foye v. Hynde, 5 Vin. Abr. 63, pl. 13.

[9] "Therefore, if I limit an estate to the use of A and his heirs till C returns from Rome, and after the return of C to the use of B in fee; here the whole fee being first limited to the use of A, there is no remnant left to limit over; and consequently the limitation to B cannot be a remainder." Fearne, Cont. Rem. 12. But an estate to the use of A and his heirs till C returns from Rome—without any limitation over—is one of the most common illustrations of a determinable fee. See Challis, Real Prop. 3rd Ed., 257.

[10] Digby, Hist. Law R. P. 5th Ed., 332.

[11] Williams, Real Prop. 22d Ed. 383-385.

of the parties, the seisin or possession of the land" shifts to him to whom the gift over is made. The gift over "springs up" and "puts an end at once and forever to the estate" belonging to the preceding owner. "Here then is the destruction of one estate and the substitution of another." His example is of a marriage settlement to the use of A and his heirs until the marriage of D and then to the use of D and his heirs. Upon the marriage of D, the seisin or possession of A is wrested from him by the use to D, instead of D's estate waiting until A's possession is over, as it must have done had it been merely a remainder.[12]

II

When the future interest is a remainder it does not wrest the seisin or possession from the preceding tenant. Where one is in actual possession of an estate upon which estates in remainder or reversion are expectant, although he does not have the fee—which, according to the facts may be in the grantor or the remainder-man[13] —he is seised in his own right and in right of all the estates in remainder and reversion under the same title.[14] The remainder-men and reversioners are equally "in the seisin of the fee." They participate in the actual seisin and possession in due order of succession; because the livery to the particular tenant is intended and is effectual at once to transfer to or in behalf of the remainder-men what, upon the suggestion of Butler, may be called the expectant seisin and this becomes seisin in law (convertible into seisin in fact by entry) upon the regular termination of the preceding interest.[15] "In such case," says Littleton, "the growing and being of the re-

[12] The term seisin is still, in the words of James, L. J. in Leach v. Jay, 9 Ch. D. 42 (1878), "one of the most technical words in our law. The word has acquired no other meaning than its technical meaning, it has never got into ordinary use." But see article by Sweet in 12 L. Q. R. 239, 247. The abolishment of livery of seisin has not materially reduced the importance of seisin. See, for example, Copestake v. Hoper (1908), 2 Ch. 10, 18.

[13] Where the remainder is contingent the fee is in the grantor until the remainder vests. See Gray, Perpetuities, Sec. 11 and citations.

[14] Leake, Prop. in Land, 2d Ed., 32, 33.

[15] "When lands of inheritance are carved into different estates, the tenant of the freehold in possession, and the persons in remainder or reversion, are equally *in* the seisin of the fee. But in opposition to what may be termed the *expectant* nature of the seisin of those in remainder or reversion, the tenant in possession is said to have the *actual* seisin of the lands. The fee is entrusted to him." Butler's note (1) Co. Lit. 266 b. "To a grantee of a reversionary estate it was impossible to make livery of seisin in the sense of giving physical possession, but on the death of the reversioner a heriot was due from him equally as on that of a person in possession, for the reversioner was equally in the seisin of the fee." Buckley, L. J. in Copestake v. Hoper (1908), 2 Ch. 10, 18. This expression "in the seisin of the fee" seems to have become a fixture. And see Challis, Real Prop. 3rd Ed., 99.

mainder is by the livery of seisin to him that shall have the freehold."[16]

Although a remainder-man is "in the seisin of the fee," he is not "seised in fact" or "in law" in the ordinary meaning of those terms. Thus there can be no dower or curtesy of a remainder or reversion because there is neither seisin in fact nor in law of such estates.[17]

Where A is tenant for life, B remainder-man in fee or reversioner in fee and B dies in A's lifetime survived by a son who also dies in A's lifetime, the remainder or reversion descends at common law to the heir of B, the first purchaser. B's position in the seisin of the fee is sufficient to constitute him a stock of descent. But this is only because he is the first purchaser. Until the remainder, if ever during his lifetime, vests in possession, he is seised neither in fact nor in law. B's son is in a somewhat different case. Though the remainder descends to him, this descent will not *ipso facto* constitute him a stock of descent. He is not the first purchaser, so a passive rôle would not suffice. If he did some act of ownership "equivalent in the eye of the law to obtaining actual ownership, had the estate been one of possession,"[18] he then became the stock of descent, and if he died intestate, his estate descended at common law to his own heir and not to the heir of his father.[19] That this act of ownership, though it is sometimes said that it gave him seisin in deed, was something different from complete seisin in deed,

[16] Tenures 721: "The remainder * * * passeth out of the donor by the livery of seisin, * * * for the particular estate and the remainder, to many intents and purposes, make but one estate in judgment of law." Co. Lit. 143 a.

[17] Williams, Seisin, 67, 68. "By [what is sometimes called] the seisin of such reversioner or remainder-man is meant, in reality, no more than that such reversioner continues or such remainder-man is placed, in the tenancy, and that the property is fixed in him. The particular estates and the reversion or remainder over form, in law, but *one estate;* and, consequently, by delivering the possession to the person first taking it extends to all. All therefore, may be said to be *seised,* as they are all placed in the tenancy, and as the property is fixed in all." Watkins, Descents, 4th Ed. 36. As to dower and curtesy, see Durando v. Durando, 23 N. Y. 331; Ferguson v. Tweedy, 43 N. Y. 543, 549; Stoddard v. Gibbs, 1 Sumn. 263, 270; Co. Lit., 29 a, b, 31 a, 32 a, b. See the interesting argument, Duncumb v. Duncumb, 3 Lev. 437. A conveyance of the remainder, act of ownership though it be, does not give a seisin that will enable the widow to obtain dower. This has been held even when tenant for life and remainder-man joined in a conveyance in fee. Otis v. Parshley, 10 N. H. 403, 407. Nor does a conveyance in fee by the remainderman alone give such seisin though it may estop the grantee to deny the seisin of the grantor. Nason v. Allen, 6 Me. 243; Lewis v. Meserve, 61 Me. 374; 14 Cyc. 981; 1 Scribner, Dower, 321-324.

[18] "A lease of the remainder or reversion for life or in tail, or a conveyance of it in fee to another person, or to a trustee and his heirs in trust for himself and his heirs, were sufficient for this purpose." Williams, Seisin, 69. But it should be emphasized that such act did not give a technical seisin. See Watkins, Descents, 4th Ed., 40.

[19] Williams, Seisin, 69. "For the exertion of such acts of ownership is equivalent to the actual seisin of an estate which is capable of being reduced into possession by entry. For, as an actual entry is not practicable in the case of such reversion or remainder, the

in the technical and accustomed sense of that term, or from seisin in fact or in law seems manifest.[20]

The explanation of this requirement, as of seisin in fact where that was possible, was practical enough. It was "to avoid further inquiry into the origin of the title."[21] The same practical end would be subserved as readily in case of remainders, by this act of ownership "fixing the property," seisin being impossible.

III.

The operation of a conditional limitation in "wresting" the seisin and possession from the owner of the preceding estate and substituting for that estate another estate has on the one hand certain characteristics of a condition and on the other hand certain characteristics of a collateral limitation followed by a remainder. But it is neither. Its operation is distinctive. Courts and text writers have often referred to the contingency on which the gift over takes effect as a "condition"[22] and not infrequently they have described the prior gift and the gift over simply as "limitations," but usually in such cases they have employed these words in unwonted senses, or have been seeking to show in what respects the executory limitation is like a common law condition or like a limitation recognized at common law.

If it is permissible to condense Fearne's thought we might say that he regards a conditional limitation as operating with the power and effect of a condition but in the manner of a limitation plus some-

---

alienation of them for a certain estate is sufficient to turn the descent; such grants being (before the Statutes 4 and 5 Anne, c. 16) always attended with atornment, the notoriety of them and the consequent alteration of the tenant, were deemed equal to the actual entry on a descent, or livery of seisin on a gift, or sale of an estate in possession; such attornment being originally *coram paribus,* and in later days sufficiently attested [citations]. And for this reason, a reversion could not be granted over to take effect *in futuro* any more than an estate in possession." Watkins, Descents, 4th Ed., 116; Challis, Real Prop., 3rd Ed., 233.

[20] Thus Challis says that by such an act "a seisin in deed, sufficient to make the person obtaining it the root of descent, might be obtained." Real Prop., 3rd Ed., 233; Watkins seems to avoid this usage. See Op. cit. pp. 32, 52. Preston, Abstracts, II, 442, in treating of "Titles under Heirs" describes the seisin thus obtained as an actual seisin. But he does not say that it would give dower or curtesy. See article by Sweet in 12 L. R. A. 239, 244-246; and note 17 above. Query as to significance of Watkins, Descents, 4th Ed., 121 and citations.

[21] "The heir originally derived title from the terms of the grant, *per formam doni,* and must accordingly have traced his descent from the original grantee or purchaser; but the adoption of the seisin as the root of descent was a maxim of convenience to avoid further inquiry into the origin of the title." Leake, Prop. in Land, 2d Ed., 43.

[22] Thus in Blanchard v. Blanchard, 1 Allen 223: "If * * * it can be regarded as a devise in fee to the five children, subject to be divested upon a condition subsequent, with a limitation over on the happening of that condition, * * * the limitation over would have taken effect only as an executory devise."

thing more. It operates in destruction of the preceding estate but it does this without the necessity of any formality. Thus, speaking of a conditional limitation in a will,[23] he says: "Wherever in a devise a condition is annexed to a preceding estate, and upon the breach or non-performance the estate is devised over, that condition shall operate as a limitation, circumscribing the continuance and operation of the first estate." This looks almost like collateral limitation. But in a moment the balance is redressed. For we are told that the conditional limitation enforces "the performance of the condition, by the determination of the preceding estate upon the breach of it." We are told that "upon the breach or performance of it (as the case may be) the first estate shall *ipso facto* determine and expire, without entry or claim."[24]

This is as far as the analogy of the conditional limitation to the condition or the collateral limitation can be fairly extended. For the limitation over wrests the seisin or possession from the owner of the first estate without entry, claim or notice and substitutes another estate; something that no common law limitation, direct or collateral, could do. Wherever the common law recognized a limitation over expectant on the determination of an estate, it was always on the regular termination of that estate and never in defeasance of it. This prime characteristic of the conditional limitation Fearne of course fully recognizes. The first estate having terminated "without entry or claim" by "the breach or performance" of the condition, he observes that "the limitation over shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have immediate right to the estate."[25]

To grasp the meaning of the phrase that an executory limitation in defeating a preceding estate "substitutes" another, it is necessary to have in mind the conception of particular estate, remainder and reversion (if any) as constituting at common law but one estate for many purposes.[26]. The tenant of the particular estate of freehold is "presumptively"[27] seised of the whole of the fee simple. Or, in Butler's words "the fee is entrusted to him."[28] When the remainder-man or reversioner comes into possession it is of his part of the one estate—though of course his interest is often spoken of as a separate estate, and for ordinary purposes it would be thought

[23] But cf. his treatment of shifting uses, which is merely in effect a transcription from Brooke, Abr., Cont. Rem. 274.

[24] Cont. Rem. 272.

[25] Ibid.

[26] Co. Lit. 143 a.

[27] Leake, Prop. in Land, 2nd Ed., 32.

[28] Butler's Note (1) on Co. Lit. 266b.

of as a separate estate.[29] But when a shifting use or an executory devise takes effect in defeasance of a preceding estate, an interest appears which cuts off the prior estate before its regular termination, as an entry on breach of condition would, though the entry revests an old estate whereas the executory limitation emplaces a new one.[30] No tenant of an estate subject to a condition subsequent is ever regarded as seised in right of the grantor and his heirs, who may enter on breach of the condition. When the grantor of an estate on condition enters he avoids the estate of the grantee—who by the feoffment, as Professor Gray puts it, had been substituted for himself as the lord's tenant—and places himself in the same relation to the lord which he had formerly held. The right to enter is "not a reversionary right coming into effect on the termination of an estate," but is a "right to substitute the estate of the grantor for the estate of the grantee."[31]

The similarity between this and an executory limitation in fee taking effect in defeasance of a fee is obvious. Estate yields to estate—in the one case a former estate, in the other a newly created one is established—and with this process comes a different tenant or owner. Yet, though it is not quite so apparent, when the executory limitation is less than a fee and acts in defeasance of an estate that is less than a fee, the effect in inaugurating a new estate line is the same. For example, if land is devised to B for life, but if B fails to pay C a stated sum then to C for life, and on C's death to D and his heirs, if the contingency happens, the interest to C takes effect in defeasance of B's life estate. It does not break down merely one of the parts of the estate line in which B is seised, allowing the rest to stand. It breaks down the whole and establishes another. C and D are not in the seisin of B; B is not seised in behalf of C or D. The limitation to D is as much executory as is the limitation to C. It is not open to question that a limitation after an executory limitation cannot be regarded as other than executory. Just as soon as C's interest is in possession, however, D is in the seisin. He is in the seisin of C. He is then a true remainder-man.[32] But he is a remainder-man in a new estate line, which had taken effect not as a part of the old estate line but on and by its destruction.

---

[29] Thus the fee in the grantor or settler until a contingent remainder vests is spoken of as a "vested estate." See Williams, Settlements, 208.

[30] Lit. Sec. 325. The distinction is stated very clearly in Watkins, Descents, 4th Ed., 210.

[31] Gray, Perpetuities, § 31. As to the process and effect of substitution, as distinguished from subinfeudation, these being the two methods of alienation known to the feudal system, see Pollock and Maitland, Hist. Eng. Law, I, 330, 339.

[32] Fearne, Cont. Rem. 503, 504, 506; Gray, Perpetuities, 3rd Ed., § 114, note 4. Tiffany, Real Prop. 328. Crairg v. Stacey, Ir. Term Ridg. L. and S. 249; Storrs v. Burgess,

IV.

The fundamental principles involved here easily shade into confusion unless the differences between the seisin, the presumptive seisin of the fee and the actual ownership of the fee are always kept in mind. The actual ownership of the fee, together with the question of abeyance of the fee, may however, in some of their aspects, be regarded as quite distinct from the doctrine of seisin. It is true that the one who is seised represents the fee for various purposes; he is presumptively seised of the fee; but he may be only a life tenant or tenant in tail.

While in a limitation of a freehold particular estate followed by a contingent remainder in fee the tenant of the particular estate has the actual seisin, and is presumptively seised of the entire fee,[33] the fee, by the better and more modern view, is in the feoffor, the grantor, until the contingent remainder vests,[34] which of course it

---

29 R I. 269, 275. "When once an executory devise takes effect in possession, the limitations depending on it change their nature and become either vested or contingent remainders," quoted in Craig v. Stacey, Ir. Term. Ridg. L. and S. 249; "Though the whole of a series of limitations, if subsequent to an executory limitation, must, in their inception, be executory limitations, yet, if the first executory limitation should afterwards become vested, then, if the subsequent limitations are such that they are *inter se* capable of being related as particular estate and remainder, they are usually styled by those names, and they possess the essential charcteristics of particular estate and remainder, although in their inception, since they would have been void at the common law, they were executory limitations." Challis, Real Prop., 3rd Ed., 124.

[33] The fee being owned by some one else the reference to the fee as "outstanding" seems, in such a case, most apt. See Egerton v. Massey, 3 C. B. N. S. 338. If the remainder in fee were vested, there would be, to adapt Fearne's words, a "passage for its transition, open at the time of the livery." Fearne, Cont. Rem. 361. There being no such passage of transition the inheritance is "outstanding" in the grantor.

[34] This is true even where there are contingent remainders with a double aspect, one of which must vest. Williams, Settlements, 207, 208; "When a conveyance is by way of use or devise, there is, unquestionably, during the contingency of a remainder in fee a reversion in the grantor or devisor and his heirs, and the prevailing opinion seems to be the same way upon a feoffment at common law." Gray, Perpetuities, 3rd Ed., Sec. 11, n. 1; Greenleaf's Cruise, II, 336 note. "And though he [the particular tenant, to whom a life estate was devised] be the heir to whom the reversion descends, that shall not drown the estate for life contrary to the express devise and intent of the will, but shall leave an opening as they term it, for the interposing of the remainders when they shall happen to interpose between the estate for life and the fee; and they compared it to *Archer's Case*, 1 Co., where though Robert the devisee for life was heir, yet the remainder to his next heir male was contingent, and so not an estate for life merged by the descent of the reversion." Plunkett v. Holmes, 1 Lev. 11; Purefoy v. Rogers, 2 Wms. Saund. 380, 382 and note. "The question is, what becomes of the intermediate reversionary interest, from the time of the making of such future disposition until it takes effect? It was in the grantor or testator at the time of making such disposition; it is confessedly not included in it. The natural conclusion seems to be that it remains where it was, viz: in the grantor or the testator and his heirs, for want of being departed with to anybody else. When the future disposition takes effect, then the reversionary or future interest passes pursuant to the terms of it; but if such future disposition fails of effect, either by reason of the determination of the particular estate,

may do before as well as immediately upon the termination of the particular estate.

If A be given any freehold less than a fee, subject to a shifting use or executory devise to B and his heirs, A again has the actual seisin and the presumptive seisin of the entire fee, and the fee also in this case is in the grantor or his heirs or the devisor's heir or residuary devisee.[35] If the contingency occurs upon which B's estate vests, it of course defeats this fee and it does so only by wresting the seisin from A who is presumptively seised of the entire fee. The executory limitation is in derogation of the freehold estate; it incidentally defeats the fee which is in the grantee, heir or residuary devisee. If the limitation is of a particular estate subject to defeasance by an executory limitation less than a fee with no limitation of the fee itself,—for instance, a devise to testator's widow, A, for life, but if A remarries then to B for life, the executory limitation upon the happening of the contingency may still be said to break down the entire estate line or presumptive fee of which A was seised. There can be no doubt that B is now seised presumptively of the fee. For this is now simply a case of a life estate upon which a reversion is expectant. Yet B was never in the seisin of A; the seisin could shift to him only upon the destruction of A's estate, not upon its regular termination. And the reversioner's interest is now expectant upon an entirely different estate and contingency. There is no doubt that the ownership of the fee is in the heir-at-law from the testator's death. But the estate line—the procession of orderly interests, each resting upon the preceding one for support—is now entirely different; it is a new estate line.[36] It must of course

failure of the contingency or otherwise; what is there then to draw the estate, which was the intended subject of it, out of the grantor or his heirs, or the heirs of the testator? Or who can derive title to an estate, under a prospective disposition, which confessedly never takes any effect at all?" Fearne, Cont. Rem. 363. The contrary view respecting feoffment at common law, was founded on an ancient principle of law, "that every remainder must pass out of the grantor at the time of the livery." 2 Wm. Saund. 382 note. "Where is the sense, in saying, a remainder must pass out of the grantor, in a case where you deny it ever passed at all to the grantee or anybody else? Or that livery must have its immediate operation, in a case where it is admitted to have left the estate in the same plight exactly as if it had never been made at all." Fearne, Cont. Rem. 363 and see 361; Williams, Real Prop., 22d Ed., 363; Bigley v. Watson, 98 Tenn. 353, 370, 371; Pinkney v. Weaver, 216 Ill. 185, 193.

[35] "In conveyances which have their operation from the statute of uses, it was always a rule that the fee remains in the grantor and his heirs until the contingency happens." 2 Wms. Saund. 382 a, note, speaking of remainders; Fearne, Cont. Rem. 351 et. seq. Greenleaf's Cruise, I, 371 et. seq.

[36] Fearne, Cont. Rem. 353 et. seq; Plunkett v. Holmes, 1 Lev. 11; Purefoy v. Rogers, 2 Wms. Saund. 380; Gray, Perpetuities, 3rd Ed., Sec. 11, note. Hayes, in speaking of shifting uses, says:—"They take effect by defeating, to the extent of the ownership comprised in them, the fee previously vested in the takers under the other limitations, or (if those limitations would not exhaust the fee) partly in such takers,

be kept clearly in mind that what is meant throughout by a presumptive fee is a certain infinite interest, an uninterrupted estate line. The terms have been used synonymously. There cannot be two common law fees in the same land. And indeed so far as the feud, or fief — that fee in that sense — is concerned, no change is made in this respect by the Statute of Uses or the Statute of Wills. Since the Statute *Quid Emptores* the tenure of the must remain the same whatever happens to the estate line; but by a "substitution" at common law, or an executory limitation under the Statute of Uses or the Statute of Wills, one infinite estate line (still in the same feud, fief or fee) can be made to take the place of another.

We may thus have a series of "turnings out and turnings in" of interests, estates, fees absolute or merely presumptive fees, of which the common law was not only incapable, but which it disliked and thought absurd. The words of one of the judges in *Cogan* v. *Cogan* strikingly reflect this feeling. Holding that a remainder must pass by the original livery and cannot be made to take effect on a contingency defeating the particular estate, he said: "A remainder cannot pass by a contingency; for then there would be an absurdity follow, viz., there should by the first livery, be an immediate reversion expectant upon the remainder for life; and afterwards this remainder shall be turned out, and the reversion also; and a new remainder and reversion shall come in place of them; so there should be turnings out and turnings in at several times, by one livery which was made at one time."[37] Impossible at the common law, that is exactly what the conditional limitation may do to-day. It may by virtue of the original seisin to uses, or by the original testamentary conveyance, turn out a series of interests related as particular estate, remainder and reversion, and turn in a new series of interests which when they are turned in, if they are duly related *inter se,* become particular estate, remainder and reversion.[38] The process it may

and partly (by way of resulting use) in A, the grantor, or (if the resulting use be negatived) in B, the grantee, or (as the case may be) partly in such takers, and partly in A, the covenantor." An Elementary View, etc., 28.

[37] Cogan v. Cogan, 1 Cro. Eliz. 360.

[38] "For example, a settlor might limit lands to the use of himself and his heirs until his marriage, and, after his marriage, to the use of himself for life, and after his death to the use of his sons successively in tail male, with divers remainders over. Here since the limitations commence with a fee, all the subsequent limitations must be executory. Nevertheless if the marriage should in fact take place, nobody would scruple to say that the settlor was then tenant for life, with remainder (contingent until the birth of a son) to his eldest son in tail male; and their respective estates would possess all the essential characteristics of an estate for life and contingent remainder. This usage is in accordance with the practice of the best authorities. For an example see Fearne, Cont. Rem. 459, where he speaks of 'a limitation after an executory devise in tail being

repeat again and yet again, always provided it keeps within the rule against perpetuities.

And it may be observed, before this aspect of the matter is dismissed, that the effect upon the estate line, the "turning out" of one estate line and "turning in" of another, is similar where the executory limitation is of the springing rather than the shifting kind. If land is devised to B for life and one year afterwards to C and his heirs, B is actually seised and has the presumptive seisin of the fee. The heirs of the devisor however, have the reversion and they are "in the seisin of the fee" until B dies.[39] Thereupon they are seised, and they are seised of the freehold, indeed of the entire fee, at common law, which of course does not recognize the limitation to C. When the year has passed the seisin is wrested from them by the new estate line in the executory devise. And the effect would be the same in a conveyance to uses.[40]

V.

In the case of a shifting use given in Brooke[41] there was a feoffment to the use of W and his heirs until A should pay a sum of money and then to A and his heirs. The question was raised whether the estate could vest in A without an entry on the part of the feoffee to uses, and it was suggested that to resolve all doubt A should enter both in his own name and in the name of the feoffee. That would make him safe either way. The question of the necessity of such entry long remained a mooted point.[42] It gave rise to that chapter of ingenious and amusing theories concerning the seisin to future uses which is one of the most astonishing in the history

---

so limited as to take effect, either in lieu of the preceding executory devise, if that failed, *or else as a remainder upon it, if that took effect'.*" Challis, Real Prop., 3rd Ed., 124.

[39] The application of this phraseology to a devise seems warranted by the rule that whenever a devise can take effect as a common law limitation it shall do so. Purefoy v. Rogers, 2 Wms. Saund., 381; Re Ashforth (1905), 1 Ch. 535; Leake, Prop in Land, 2d Ed., 262; Stephens v. Stephens, Cas. Talb. 228; Re Wrightson (1904), 2 Ch. 95.

[40] The use to C, changing the above illustrations to that extent, would be a springing use. After B's life estate had terminated, the feoffor to uses would be seised of the fee, precisely as though he had made the conveyance to the use of C without the life estate to B. See Leake, Prop. in Land, 2d Ed., 256; Fearne, Cont. Rem. 390; Sir Edward Clere's Case, 6 Co. 17 a; Greenleaf's Cruise II, 326.

[41] Mr. Shaw Fletcher in his essay on "Contingent and Executory Interests in Land," published in 1915, gives cases of shifting uses occurring in or about the years 1393, 1398 and 1417; pp. 107, 108, 225, 226, 227. Brooke, in the case above mentioned, which occurred seventeen years after the Statutes of Uses, says that a "use shall change from one to another by act *ex post facto,* by circumstance, as well as it should before the said statute." Bro. N. C. pl. 423.

[42] Gray, Perpetuities, § 137, n. 4 and citations.

of real property. But the old and conflicting ideas are now buried beneath a load of authority, statute and ridicule[43] and it has long been admitted that no entry by or in the name of the feoffees is necessary.[44] The seisin is shifted and the estate vested "without the thought or care" of the feoffee to uses or any *cestui que use.* The use and with it the seisin shifts by the happening of the contingency. Even in cases where there was a conveyance to uses without transmutation of the seisin—as in deeds of bargain and sale and covenants to stand seised—no entry was or is necessary. A bargainee was constructively in possession under the statute without any actual entry.[45]

And now that the accepted principle is that the estates take effect "when and as they arise" without regard to the subsequent fate of the original seisin to uses,[46] the question is no longer even academic. It is not necessary that the feoffee to uses be deemed to have possibility of seisin, or *scintilla juris,* so as to support the future uses. They will be executed without entry by him or anyone else. They operate in defeasance of the preceding estate "by circumstance" and the Statute of Uses simply confers the seisin upon the *cestui,*—since the condition which would invoke the statute has been absolutely satisfied by the original conveyance of a freehold to uses, present or future, vested or executory.[47]

Still it must not be thought that this ultimate disposition of the matter assimilates the effect which a conditional limitation has on the seisin to that of a remainder or a reversion. At common law he who has a remainder or a reversion expectant on an estate of

---

[43] Williams, Real Prop., 22d Ed., 386; Digby, Hist. Law R. P., 5th Ed., 371 n.; Hayes, Real Estate, 166, described the doctrine of *scintilla juris* as an "invention to get rid of an assumption"; Reeves, Real Prop., 1206.

[44] Gray, Perpetuities, § 137, n. 4; Leake, Prop. in Land, 2d Ed., 91.

[45] Challis, Real Prop., 3rd Ed., 410.

[46] Or as Leake says: "After much abstruse speculation concerning the nature of the statutory process, the result generally accepted seems to have been that it immediately converted uses of all admissible kinds into legal limitations in a manner quite beyond the power or control of the grantees to uses, and that the latter were merely formal instruments for carrying the legal title to the uses." Prop. in Land, 2nd Ed., 90.

[47] "No *scintilla* whatever remains in the feoffees, but * * * upon a conveyance to uses, operating by transmutation of possession, *immediately after the first estate is executed* the releasees to uses are divested of the whole estate; the estates limited previously to the contingent uses take effect as legal estates, the contingent uses take effect as they arise by force of, and relation to, the seisin of the releasees under the deed. * * * This * * * would at once overthrow the fiction of *scintilla juris,* and with it the supposed necessity of an actual entry to revive contingent uses." Sugden, Powers, 8th Ed., 19. Sugden's view, as expressed here, after much urging by him, became incorporated in 23 and 24 Vict., c. 38, Sec. 7, the wording of which is that the estate of the *cestui que use* is to take effect "by force of and by relation to the estate and seisin originally vested in the person seised to the uses."

freehold, obtains his seisin by virtue of the livery to the particular tenant. The seisin is delivered to the particular tenant in his behalf. (Certain deeds today operate as, or take the place of, a feoffment in this respect.) But where land is conveyed to A and his heirs to the use of B and his heirs but if C returns from Rome then to the use of D and his heirs, the seisin which is in B by force of the Statute of Uses[48] is a seisin of the entire fee. And therefore though D's interest upon the happening of the contingency also takes effect "by force of and by relation to the estate and seisin originally vested in the person seised to the uses,"[49] it does so in absolute derogation of the preceding estate, wresting the seisin from B. To recall what Littleton indicated, a remainder "grows" on the particular estate. But an executory limitation uproots the estate upon which it operates, and plants itself in the place thereof. Moreover a sometime remainder-man while seised in law is not seised in fact until he makes entry whereas a *cestui que use* if his interest is or has become a present interest may be seised in fact.[50] "The Statute of Uses has always been considered to give a possession which for some purposes was to be treated as actual possession."[51]

HAROLD M. BOWMAN.

Boston University Law School.

[48] "As he might have possession by force of a devise at common law, so he shall have possession of the land here by force of the statute, and it is in cestui que use, before entry or agreement." Walmsley J. in Green v. Wiseman, Owen 86 (1600). See the argument by Joshua Williams, and the decision in Heelis v. Blain, 18 C. B. N. S., 90.

[49] See Note 47.

[50] "And the seisin and possession thus transferred is not a seisin and possession in law only—not a mere title to enter upon the land, but an actual estate." Witham v. Brooner, 63 Ill. 344, quoting Cruise; Hutchins v. Heywood, 50 N. H. 491. Watkins, Descents, 4th Ed., 25 n. Note (z).

[51] Bovill, C. J. in Hadfield's Case, L. R. 8 C P. 306, 314. "The Statute of Uses," said Lord St. Leonards in Egerton v. Brownlow, 4 H. L. C. 1, 206, "transferred uses, not into possessions, that is, made uses possessions."